In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. 1148

KENNETH F. HOWARD,

Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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Petitioner's "Statement of the Case" is grossly misleading and in part incorrect.

Petitioner was not injured in going down the side of a ten foot stack of lumber on deck of a ship. He was injured when he stepped from the clean surface of a package of lumber 2½ feet high off of the main deck (Tr. 46) over to the "waterguard" or "thresh-

old" of an open doorway leading into a mast house of the ship. His foot slipped on the clean waterguard and he bumped his head on the overhead of the doorway.

This waterguard across from the package of lumber and parallel to it was about 28 inches long (width of doorway) and eight to ten inches wide (Tr. 63, Def. Ex. B). It was 16 to 18 inches high off the main deck and 2 feet 4 inches away and across from the packaged lumber. Both waterguard and main deck between it and the lumber was clean. The door to the mast house was swung open and secured (Tr. 60, Def. Ex. A, B, C and D. Tr. 62, 68). Petitioner knew of no reason why he could not have put his hand on the open door to help him step down to the main deck or to the waterguard (Tr. 76).

Both before and after the accident Petitioner at no time slipped, although he used the same access to the sounding well (Tr. 70). When the door to the mast house was closed, plaintiff "slid" down to the deck from the package of lumber 2½ feet off the deck (Tr. 72). Before the accident, as he did at time of the accident when the mast house door was open, he would step with his right foot to the waterguard and then with his left foot to the deck between the packaged lumber and doorway (Tr. 72). Petitioner wore shoes with neoprene soles which were concave instead of having heels (Tr. 66).

The accident occurred in morning daylight. Weather was normal with the ship having only a little

pitch and roll (Tr. 66). At time of accident, the OREGON MAIL was four or five days out of Seattle, steaming for Yokohama (Tr. 69).

The record in this case does not bear out Petitioner's statement (Pet. p. 4) that the access provided Petitioner "was not the usual method of access of sounding wells" (Tr. 168). In fact, the contrary was proven to be true (Tr. 201, 203, 216).

The Supreme Court of the State of Oregon in its opinion affirming the verdict directed for respondent more accurately than Petitioner states the facts concerning how Petitioner was injured (Pet. p. 7).

This is that "infrequent" case where fair minded jurors could not reasonably differ over Petitioner's failure to prove either causative negligence or unseaworthiness

How and under what conditions Petitioner bumped his head is beyond dispute as the testimony was exclusively from Petitioner himself. Petitioner accidentally slipped under conditions which were not unusual, difficult or extreme in any sense but reasonable, normal and customary.

Petitioner and not the Supreme Court of the State of Oregon misreads *Rogers* v. *Missouri R. Co.* (1957) 352 U.S. 500. Petitioner would have this Court hold that when an accident occurs aboard ship, irrespective of whether any evidence of negligence or unseaworthiness is shown, the case must go to the jury for it to speculate in the hope it might have compassion for

Petitioner and give him some money, anyway. Such is not the mandate of either the Jones Act, 46 U.S.C. 688 or the general maritime law.

Had Petitioner read the three other cases which were considered by this Court along with *Rogers*, supra, he would have better understood *Rogers*, supra, and more particularly have read the simultaneously considered case of *Herdman* v. *Pennsylvania R. R.* (1957) 352 U.S. 518. In that case this Court affirmed a directed verdict for the defendant railroad with Justice Harlan writing a concurring opinion and Justice Frankfurter dissenting only because he considered the writ of certiorari to have been improvidently granted.

In that case the injured Petitioner was a conductor riding in the caboose of a freight train which, while going slow, came to a sudden non-scheduled stop three miles out of Dayton, Ohio. The stopping threw the conductor against a table and he claimed injury. He sought to go to the jury under the doctrine of *res ipsa loquitur*. This Court affirmed denial of right to jury consideration because there was no evidence that the train stop was made with any special or unusual severity. There was nothing unusual about the event. This is still good law, *New York, New Haven & Hartford R. Co.* v. *Henagan*, (1960) 364 U.S. 441; *Inman* v. *Baltimore & Ohio R. Co.*, (1959) 361 U.S. 138.

At bar, of course, there was no action of any kind save Petitioner's stepping from one place to another

which he had done before and after the accident many times without incident. Here it is hard to imagine a more negligent-free and unseaworthy-free static set of circumstances.

Petitioner in no way attempted to prove that the access he had to the sounding well near the mast house was unusual, different, or non-customary. Thus, whether or not Respondent's proof of the access being usual and customary be considered, no evidence existed to create a fact issue for the jury.

Finally, we consider Petitioner to be impertinent when asserting as reason for a writ that: "The Oregon Supreme Court has made it clear that it does not intend to follow the rulings of *Rogers* v. *Missouri Pacific R. Co.*, supra, *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 . . . ." In its opinion (Pet. p. 11) the Supreme Court of Oregon expressly stated:

> "We also recognize that our decisions in such cases are controlled by the 'broad doctrines' established by the Supreme Court of the United States."

Most recently, in *Epton* v. *American Mail Line*, (July 16, 1970) 91 Or. Adv. Sh. 353, 474 P.2d 516, wherein this Respondent lost on appeal, the Oregon Supreme Court went to extremes to embrace this Court's decisions in a seaman case by accepting as law that which this Respondent had regarded at most only to be dicta.

CONCLUSION

Under the undisputed facts in this simple case, Petitioner as plaintiff failed to present evidence from which a fair minded jury could with reason find Respondent causatively negligent or the OREGON MAIL causatively unseaworthy.

This case presents no federal question of any substance not heretofore determined by this Court. The Supreme Court of the State of Oregon in affirming judgment based upon a directed verdict for shipowner decided this case well within the applicable decisions of this Court. It would be improvident to grant a writ of certiorari in this case.

Respectfully submitted,

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